STATE OF MICHIGAN

COURT OF APPEALS

MATTHEW W. MANCZAK,

Plaintiff-Appellant,

v

CITY OF BAY CITY,

Defendant-Appellee.

UNPUBLISHED
March 27, 1998

No. 199395
Bay Circuit Court
LC No. 94-003071-CZ

Before: McDonald, P.J., and Sawyer and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7), (8) and (10). We affirm.

We review a grant of summary disposition based upon a failure to state a claim, MCR 2.116(C)(8), de novo. *State Treasurer v Schuster*, 215 Mich App 347, 350; 547 NW2d 332 (1996). A motion for summary disposition pursuant to MCR 2.116(C)(8) should be granted only where the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right to recovery. *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992). Similarly, on appeal, a trial court's grant or denial of summary disposition pursuant to MCR 2.116(C)(10) will be reviewed de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1996). A court is required, pursuant to MCR 2.116(C)(10), giving the benefit of reasonable doubt to the nonmovant, to determine whether a record might have been developed which would leave open an issue upon which reasonable minds could differ, *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995).

I

Plaintiff first argues that the trial court erred as a matter of law when it dismissed plaintiff's legislatively created public policy and retaliation claims on the basis that such claims are only applicable to "at will" employment contracts. Since it was undisputed that plaintiff was a just-cause employee under a collective-bargaining agreement, the trial court did not err in finding that plaintiff could not maintain an action for violation of public policy, and in dismissing this cause of action for failure to state a

claim upon which relief could be granted pursuant to MCR 2.116(C)(8). *Suchodolski v Michigan Consolidated Gas Co*, 412 Mich 692, 694-695; 316 NW2d 710 (1982), indicates that a claim of a violation of public policy is an exception to the at-will employment doctrine. Other cases have recognized that this tort theory of liability for wrongful discharge arises only in the context of employment at will, e.g., *Clifford v Cactus Drilling Corp*, 419 Mich 356, 360; 353 NW2d 469 (1984), citing *Sventko v Kroger Co*, 69 Mich App 644; 245 NW2d 151 (1976); *Prysak v R L Polk Co*, 193 Mich App 1, 9; 483 NW2d 629 (1992); *Phillips v Butterball Farms Co (After Second Remand)*, 448 Mich 239; 531 NW2d 144 (1995). Since the principle has never been extended to a just-cause employee and such an employee is afforded this protection by virtue of the fact that he cannot be discharged but for cause, the trial court's ruling was proper.

Second, plaintiff claims retaliatory discharge for seeking legal representation from his personal attorney and the union, and for bringing a lawsuit in respect to a contravention of MCL 37.1602, MSA 3.550(602), a provision of the Handicappers' Civil Rights Act which provides as follows:

> A person . . . shall not:
>
> (a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.

In *Suchodolski*, *supra* at 695 n 2, the Court recognized this "explicit legislative statement prohibiting the discharge, discipline, or other adverse treatment of employees who act in accordance with a statutory right or duty" as a public policy exception to the employment-at-will doctrine. In *Phillips*, *supra* at 246-247, the Court explained the source of the right against retaliatory discharge:

> . . . the source of this right against retaliatory discharge does not stem from any term agreed upon by the contracting parties, but from public policy now expressed in a statute.

To present a prima facie case of retaliatory discharge, the plaintiff must prove that he engaged in protected activity, that the employer knew about the activity, that the employer took action that was adverse to the plaintiff, and that there was a causal connection between the protected activity and the adverse employment action. *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997), citing *Polk v Yellow Freight System, Inc*, 876 F2d 527, 531 (CA 6, 1989). If the plaintiff proves a prima facie case, the employer must advance a legitimate, nondiscriminatory reason for the adverse action. If the employer succeeds, the plaintiff must prove that the employer's reason was a pretext for retaliation. *Dixon v WW Grainger, Inc*, 168 Mich App 107, 116; 423 NW2d 580 (1987).

We find no evidence to support plaintiff's contention that defendant discharged plaintiff because he exercised his right to union representation. In addition, plaintiff failed to show that there was a causal connection between the protected activity of seeking legal representation and the adverse employment

action. The evidence demonstrated that plaintiff was suspended so that his medical condition and capabilities could be evaluated. Defendant had requested plaintiff's medical information before it was advised of plaintiff's lawsuit. In order to complete this evaluation, plaintiff had to provide a list of medical care providers and medical releases. Plaintiff was expressly warned that failure to comply would constitute insubordination and result in termination, and was terminated only after he had repeatedly failed or refused to provide the information. Thus, we conclude that plaintiff did not establish a prima facie case of retaliation.

II

Plaintiff next argues that the trial court erred when it misinterpreted the language of the statute to create an "exception" to the Whistleblowers' Protection Act, MCL 15.361 *et seq*.; MSA 17.428(1) *et seq*., when it found that an employer could retaliate against an employee who would otherwise be protected by the WPA, as long as the employee is "participating in an investigation, hearing, or inquiry held by that public body." A careful reading of the relevant section of the WPA, MCL 15.362; MSA 17.428(2), reveals that, contrary to the trial court's holding, the WPA provides that an employee is not only protected when the employee reports or is about to report a violation or suspected violation of a federal or state statute or regulation to a public body, but also if a public body requests that the employee participate in a court action or an investigation or hearing by the public body.

However, the central question is whether plaintiff could maintain a prima facie case of retaliation under the WPA by proving that he "report[ed] or [was] about to report . . . a violation or a suspected violation of a law . . . to a public body." *Dolan v Continental Airlines*, 454 Mich 373, 379; 563 NW2d 23 (1997). In addition, to maintain a prima facie case, plaintiff had to prove that he was "subsequently discharged, threatened, or otherwise discriminated against" and "that a causal connection existed between the protected activity and the discharge, threat or discrimination." *Phinney v Perlmutter*, 222 Mich App 513, 553; 564 NW2d 532 (1997). We find that the evidence did not support plaintiff's contention that the discharge was predetermined, and that the filing of the lawsuit was a factor in his discharge. Accordingly, we conclude that the trial court did not err when it found that there was no causal connection between plaintiff's alleged protected activity and the discharge.

III

Plaintiff next argues that the trial court erred when it dismissed plaintiff's Handicappers' Civil Rights Act claims. It follows from the Court's holding in *Sanchez v Lagoudakis*, 440 Mich 496, 497-498; 486 NW2d 657 (1992), that the HCRA, MCL 37.1101 *et seq*.; MSA 3.550(101) *et seq*., prohibits discriminatory treatment, even if such treatment is based on the employer's erroneous perception that the employee is handicapped. Like other cases alleging prohibited discrimination, handicap discrimination cases require that, to establish a prima facie case, a plaintiff must prove: (1) that he is handicapped (or perceived to be handicapped); (2) that the handicap is unrelated to his ability to perform the duties of a particular job; and (3) that he has been discriminated against due to the handicap. *Crittenden v Chrysler Corp*, 178 Mich App 324, 331; 443 NW2d 412 (1989).

In considering whether a handicap is related to a plaintiff's ability to perform the duties of a particular job, a court is entitled to consider that a plaintiff's condition in a job involving the safety of the public may represent a danger to himself or to the public. *Dauten v Muskegon Co*, 128 Mich App 435, 438; 340 NW2d 117 (1983). We find that the trial court did not err in finding that the plaintiff was unable to prove that his handicap or perceived handicap was unrelated to his ability to perform the job. From the reports of field training officers who evaluated plaintiff, it appears that plaintiff's performance in written communication was very weak, and that plaintiff regressed a great deal during the fourth week of his training. The overviews of two field training officers indicated that, although plaintiff was performing at an average to above average level in most areas, certain areas of performance were clearly marginal or not acceptable, and that plaintiff's handicap was related to his ability to perform his job duties.

Similarly, the medical reports gave no indication that plaintiff's handicap had no relation to his ability to perform the duties of a police officer. One medical report stated that plaintiff was "not considered to be an appropriate candidate to pursue employment as a police officer." Another report expressed the opinion that "the residual cognitive deficits [were] of sufficient magnitude that . . . would preclude his ability to function as a police officer." Because these medical reports demonstrated that plaintiff's handicap was related to his ability to perform the duties of a police officer and plaintiff failed to present evidence that his handicap was unrelated to his ability to perform the duties of the particular job, the trial court did not err in finding that plaintiff could not demonstrate a prima facie case of handicap discrimination under the HCRA, and in dismissing plaintiff's HCRA claim as a matter of law pursuant to MCR 2.116(C)(8) for failure to state a claim upon which relief could be granted. That plaintiff was suspended on January 21, 1994, even though he had been promised that his evaluation period would last until January 28, 1994, may indicate that the police chief acted somewhat prematurely, but it does not in any way significantly affect the conclusion that plaintiff's handicap was related to plaintiff's ability to perform the duties of a police officer.

Affirmed.

/s/ David H. Sawyer
/s/ Joel P. Hoekstra